

# SOUTH DAKOTA DEPARTMENT OF AGRICULTURE LIVESTOCK LOAN PARTICIPATION CERTIFICATE AND AGREEMENT

This Loan Participation Certificate and Agreement represents an agreement between the South Dakota Department of Agriculture, by and through its Agriculture Enterprise Program (hereinafter "Participant") to participate an amount of money not to exceed that which is set forth below, to the undersigned financial institution (hereinafter "Lender") under the terms and conditions numbered 1 through 14 included herein.

## 1. SALE

<b>Lender</b> _____	<b>Participant</b> _____	<b>Borrower</b> _____
<b>Name</b> _____	<b>SD Department of Agriculture</b>	<b>Name</b> _____
<b>Address</b> _____	<b>523 E. Capitol Ave., Foss Building</b>	<b>Address</b> _____
<b>City</b> _____	<b>Pierre SD 57501</b>	<b>City</b> _____

Date Note	Note Number	Principal Amount Outstanding	Lender's Investment	Participant's Investment	Due Date	Lender's Interest Rate	Participant's Interest Rate

Lender has agreed to sell and assign and Participant has agreed to purchase, for the amount of Participant's investment shown above, which shall be paid by Participant upon written notification of loan closing from the Lender, an undivided interest in the principal amount outstanding of that certain promissory note (the "Note") of Borrower to Lender described above equal in amount to that percentage of the principal amount outstanding which Participant's investment is of the principal amount outstanding; and Lender certifies that upon the date of such payment by Participant, Participant will be the owner of such an interest in the Note and collateral and will be entitled, under the circumstances and to the extent provided in this agreement, to enforce and collect the Note. Notwithstanding any provision herein, sale of this participation is without recourse. For purposes of this agreement, the loan will be considered closed when all loan and security instruments have been duly executed, filed and recorded as by executed security agreements, guarantees, assignments, mortgages and/or financing statements in favor of Lender.

## 2. COLLECTIONS AND EXPENSES

Lender shall receive all Collections, as defined in Section 9, and apply them on the day of receipt as follows: Collections shall be applied first to interest which is due on the Note at the Lender interest rate and Lender shall remit to Participant, from the interest collected, an amount of interest computed at Participant's Interest Rate on the unpaid balance of Participant's investment. Collections in excess of Interest are "Principal Collected" and Lender shall remit to participant the Participant's percentage of Principal Collected, less Participant's percentage of Expenses, as indicated below, not previously paid by Participant. Participant's percentage of Principal Collected is:

A. Participant's share of collections.  
Pro rata. \_\_\_\_\_ % of Principal Collected, plus accrued interest to date at Participant's interest rate.

B. Participant's percentage of expenses.  
Shared Expenses. \_\_\_\_\_ % of expenses.

## 3. ADMINISTRATION AND SERVICING

Lender will at all times exercise the same degree of care and discretion in servicing the loan and collecting the payments as it would take in servicing and collecting the loan if the loan were held solely for the Lender's account. So long as Lender exercises such are in the servicing and management of the loan, it shall not be under any liability to participant with respect to anything it may do or refrain from doing in the exercise of its judgement or which may seem to Lender to be necessary or desirable in the servicing and management of the loan, except for its willful misconduct or gross negligence.

Lender may take any action determined by it in its sole discretion to be appropriate to enforce payment of the Note or to realize upon any collateral but it shall not, without the written consent of Participant, extend, renew, amend or change the Note or Agreements, or grant any consents, waivers, variances or releases thereunder or permit the release or substitution of any collateral therefor. Lender shall with reasonable promptness notify participant of any material default of Borrower of which it becomes aware and of any other matters which, in its judgement materially affect the interest of the parties in the loan. In the event of a default by the Borrower, it is hereby agreed that if either party to this agreement deems foreclosure a necessary remedy, foreclosure of both parties' interest in the loan will be required. In the event adequate funds are not available to meet regular installments of the loan herein described, the funds available will be apportioned to the parties hereto based upon their respective current installments of principal and interest due.

In the event of foreclosure, sale, or liquidation of the secured property, fixed assets or other obligations due to the parties hereto, from the Borrower, such sums received from foreclosure, sale, or liquidation shall be paid to each of the parties hereto in direct proportion to the original principal amounts advanced by the parties.

## 4. ADDITIONAL TERMS

This certificate and agreement includes the additional terms on the reverse side

Dated as of \_\_\_\_\_, 20\_\_\_\_

Participant _____	Lender _____
By: _____	By: _____
Title: _____	Title: _____

## **ADDITIONAL TERMS**

**5. REPRESENTATIONS AND WARRANTIES OF LENDER. LENDER REPRESENTS AND WARRANTS THAT:**

- a. It has submitted true and complete copies of all relevant loan documents validly executed by Borrower (co-makers, guarantors, and/or endorsers inclusive) and loan documents are valid and endorsable in accordance to their terms subject to the normal exceptions for bankruptcy and insolvency and enforcement of equitable remedies;
- b. All liens, mortgages and security instruments have been properly perfected and Lender holds a first priority lien, mortgage and/or security interest as indicated by the loan documents;
- c. It has unencumbered ownership in the loan, the requisite authority to sell the participation and any required consents from the Borrower have been obtained; and
- d. It will continue to take whatever actions may be necessary and proper to maintain the perfection and priority of all liens, mortgages and/or security interest in loan collateral.

Lender makes no further or additional representations and warranties, express or implied, as to the ability to collect the loan; continued solvency of the Borrower; or as to the continued existence, sufficiency, or value of any collateral.

**6. REPRESENTATIONS AND WARRANTIES OF PARTICIPANT. PARTICIPANT REPRESENTS AND WARRANTS THAT:**

- a. Its execution of this Participation is not made in reliance upon any representations of the Lender not contained in this Certificate and Agreement;
- b. It has received and examined prior to the execution of the Certificate and Agreement all information, documents, certificates and agreements which Participant deems necessary to make an informed, knowledgeable and sophisticated decision with respect to the participation; and
- c. It is duly authorized to purchase the participation and has conducted its own independent evaluation of the Borrower's creditworthiness,

**7. DOCUMENTATION:**

Lender will retain for itself and Participant the Note, all possessory collateral securing the Note and all agreements, guarantees and other documents relative to or securing the Note (the "Agreement"). Lender will furnish to Participant copies of the Note and Agreements and all annual financial statements of Borrower received by Lender and will furnish to Participant, on request, copies of all notices and other financial statements of Borrower received by Lender. Participant may, upon request and at any time during banking hours, examine the financial records of Lender relating to the loan evidenced by the Note.

**8. COLLATERAL:**

The collateral, if any, for the loan shall be evidenced by executed security agreements, guaranties, assignments, mortgages, and/or financing statements in favor of the Lender. The parties hereto agree that their respective positions as secured creditors with reference to the loan herein described will be considered to be in a parity position as between the parties hereto. As used herein, parity shall mean equal rights with reference to the collateral which is the security for the loan, so that in the event of a default by the Borrower, each of the parties hereto will be affected on a proportionate basis.

**9. COLLECTIONS:**

"Collections" means all payments of principal and interest received by Lender on the Note, including payments by or on behalf of Borrower, payments received from guarantors of sureties, insurance proceeds, payments received by means of set-off by Lender and net proceeds received from the sale or disposition of collateral for the Note. In the event any Collections remitted to Participant are not finally collected by Lender or are required to be repaid by Lender to or for the account of Borrower; Participant shall immediately return such Collections to Lender.

**10. EXPENSES:**

"Expenses" include, without limitation, out-of-pocket expenses incurred by Lender in collecting, enforcing, or protecting the Note or any collateral securing it. Lender shall submit an accounting of all expenses incurred.

**11. OTHER LOANS:**

Any amounts advanced or additional loans made to the Borrower in excess of the original amount of the loan as herein described will not be covered by the Agreement, unless prior written consent is obtained from the other party hereto; provided, however, that "protective advances" made by either party hereto, for the mutual protection of both parties, shall receive first priority in the apportionment of funds as herein described. For the purposes of this agreement, the parties agree that "protective advances" are payments made by one of the parties hereto for the purpose of protection of the financial interests of the parties, which are added to the principal amounts due from the Borrower.

**12. REMEDIES:**

In the event of the insolvency of the Lender, or an assignment for the benefit of creditors, the appointment by any public authority of any person in charge of its assets, or a breach of this Participation Certificate by the Lender, or in the event of the involuntary sale of the loan described herein or any future advances made thereunder, it is agreed that the Participant shall automatically, in any such event, have the option to exercise all of the powers hereinabove granted to the Lender and an option to designate any person or firm, in its discretion, to exercise such powers. In the event either party hereto fails to promptly provide funds required to be paid hereunder by such party, the other party is authorized to supply or pay the same and it shall be reimbursed from the first funds available for the account of such defaulting party. The provisions of the paragraph shall not limit the exercise of any other remedy at law or in equity.

**13. MISCELLANEOUS:**

- a. Participation shall not, without the prior written consent of Lender, sell, assign, pledge, subparticipate or otherwise transfer its rights in the Note. Lender will not transfer its interest in the Note without the prior written consent of the Participant.
- b. All notices shall be sent by first class mail and addressed to the main office of the other party.
- c. This Agreement binds and inure to the benefit of the successors and assigns of the parties hereto and is governed by the laws of the State of South Dakota. This agreement shall remain in full force and effect until such time as the loan herein described has been satisfied of record.

**14. OTHER PROVISIONS:**

**SOUTH DAKOTA DEPARTMENT OF AGRICULTURE  
LOAN PARTICIPATION AGREEMENT AND  
LOAN GUARANTEE AGREEMENT**

**DISCLAIMER**

By entering into the loan participation agreement or loan guarantee agreement neither the State of South Dakota nor the Department of Agriculture warrants or agrees that the borrower is in compliance with environmental requirements, zoning requirements, corporate farming restrictions, or any other federal, state or local law for the project involved or for any other enterprise of the borrower.

Dated as of : \_\_\_\_\_

\_\_\_\_\_  
Lender

\_\_\_\_\_  
Address

\_\_\_\_\_  
City                      State                      Zip

State of South Dakota  
Department of Agriculture  
Foss Building  
523 E. Capitol Ave.  
Pierre SD 57501

BY: \_\_\_\_\_  
Signature

BORROWER(S):

BY: \_\_\_\_\_

BY: \_\_\_\_\_

South Dakota Department of Agriculture  
Foss Building  
523 E. Capitol Ave.  
Pierre SD 57501-3182

Re: \_\_\_\_\_

Dear Ms. LaBrie Baker:

I am the attorney for \_\_\_\_\_ (the "Borrower") in connection with Borrower's loan from \_\_\_\_\_ Bank and Borrower's promissory note for the \_\_\_\_\_ project (or use loan number or reasonably identify the loan), which loan is a participation loan with the South Dakota Department of Agriculture. All terms used in this opinion letter and not defined shall have the same meanings as given to them in the Loan Agreement.

Based on my review of the relevant proceedings and documents, I am of the opinion that:

1. The Borrower is a \_\_\_\_\_ (corporation, partnership, LL), other) duly organized and validly existing under the laws of the State of South Dakota.
2. I have reviewed SDCL ch. 47-9A and the South Dakota Constitution, Article XVIII and am of the opinion that borrower is in compliance with those provisions. (Specifically explain (a) whether the proceeds of the loan will be used for activity addressed within the corporate farming restrictions i.e. cultivation of farmland or keeping and feeding of livestock, and (b) the nature of any exemption claimed by borrower from the corporate farming restrictions and an explanation of the basis for such exemption).
3. The Borrower has the authority to undertake the project described in Borrower's loan application, to enter into the Loan Agreement, to issue the Promissory Note, and to perform its obligations under the Loan Agreement and the Promissory Note.
4. Borrower has acquired or will acquire the real property necessary for the construction of the Project, together with those rights-of-way, easements, permits and licenses necessary for the construction, operation and maintenance of the project; that the legal instruments evidencing that acquisition are in appropriate and due legal form and adequately confer upon the Borrower the necessary rights for the construction, operation and maintenance of the Project; that such omissions or defects as may exist will in no substantial way or manner endanger the value or operation of the project and its facilities and that those legal instruments have been duly and properly recorded in the appropriate public land records of each county in which any land affected thereby is situated.
5. \_\_\_\_\_ is authorized to execute, perform and deliver the Loan Agreement and Promissory Note on behalf of Borrower, and the Loan Agreement and the Promissory Note are valid and legally binding obligations of the Borrower, enforceable in accordance with their respective terms, except to the extent that the enforceability thereof may be limited by laws relating to bankruptcy, insolvency or similar laws affecting creditors' rights generally, and general principles of equity.
6. The Loan Agreement creates a valid lien on the funds and property pledged by the Loan Agreement for the security of the Loan Agreement and the Promissory Note, and no other debt of the Borrower is secured by a superior lien on such collateral.
7. There is no action, suit proceeding, inquiry or investigation at law or in equity, by or before any judicial or administrative court, agency or body, pending or threatened against the Borrower or its Project, wherein an unfavorable decision, ruling, or finding would materially adversely affect the validity or enforceability of the Loan Documents, or would materially adversely affect the ability of the Borrower to comply with its obligations under the Loan Documents.

Sincerely,

\_\_\_\_\_  
Attorney for the Borrower